In the case of McDONOUGH ET AL V. U.S., 202 F. 2nd 424, it merely held that slot machines were not contraband and should be returned to the place where they were seized.

While none of these cases are completely in every respect pertinent to questions raised in the present case, yet it can be seen by reading these cases that the District Courts all felt that the Act should be limited in its application to interstate commerce, which is in accord with the intention of Congress as we have set out briefly in this brief.

We invite this Honorable Courts' attention to the decision rendered by Judge Scarlett, the Judge of the District Court, which is contained in pages 4 and 5 of the transcript of the records, in which he quotes Judge Sloan and Judge Cooper in two other cases.

3. DISCUSSION OF AUTHORITIES CITED BY THE GOVERNMENT.

The government, to sustain its position that Congress may require, as a means of enforcing a valid law, the keeping of records showing whether or not the law has, in fact, been complied with, and that the government may require records, even of intrastate transactions, since it is an appropriate means to a legitimate end, relies principally upon the following cases:

U.S. V. DARBY, 312 U.S. 100; 61 S. Ct. 451.

BALTIMORE & OHIO RAILROAD COMPANY V. INTERSTATE COMMERCE COMMISSION, 221 U.S. 612; 31 S. Ct. 621.

BOARD OF TRADE OF CHICAGO ET AL. V. OLSEN ET AL. 262 U.S. 1; 43 S. Ct. 470.

UNITED STATES V. WRIGHTWOOD DAIRY COMPANY, 315 U.S. 110.

UNITED STATES V. SULLIVAN, 332 U.S. 689.

WICKARD V. FILBURN, 317 U.S. 111.

We do not feel that any of these cases are controlling in the present case and we will discuss them in the order that we have them above.

U.S. V. DARBY, above cited, can be distinquished from the present case for the following reasons:

(1.) See page 111: "The indictment charges that appellee is engaged, in the state of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that he does in fact so ship a large part of the lumber so produced."

The indictment further alleges: (See the same page) "that appellee unlawfully failed to keep such records of employees engaged in the production and manufacture of goods, to-wit, lumber, for interstate commerce."

In the present case there is no such allegation that the defendants were involved in the shipment of slot machines in interstate commerce. On the contrary, it was conceded that there were no interstate sales.

(2.) In the Darby case it is plain to see that production of lumber within a state would affect interstate commerce, since even if Darby had not shipped in interstate commerce, lumber produced by employing substandard labor could have been sold intrastate much cheaper than lumber could have been sold by persons producing it in other states, desiring to sell it in Georgia, which would have had the effect of cutting off producers outside of the state from competing in the State. But, in the present case interstate shipment of slot machines is prohibited and there can be no interstate commerce, as far as the state of Georgia is concerned. Therefore the market value of machines in other states could not affect in anywise the market value of machines in Georgia, nor could the market value in Georgia affect the market value of machines in other states.

(3.) In the Darby case under the terms of the wage and hour law, interstate commerce was not prohibited absolutely, but it was only prohibited as to those who did not comply with the provisions of the wage and hour law. In other words, the producers themselves could, by complying with the wage and hour law, ship in interstate commerce.

In the present case there is nothing that appellees could do whereby they could in anywise engage in interstate commerce, since it is prohibited by Section 1172 of the Act.

(4.) In the Darby case there was an intermingling of interstate and intrastate transactions, which were

not readily capable of being separated. Whereas, in the present case there are no interstate transactions.

THE BALTIMORE AND OHIO RAILROAD COMPANY V. INTERSTATE COMMERCE COMMISSION, above cited, differs from the present case because:

(1.) Baltimore and Ohio Railroad Company was engaged in interstate commerce, and the Court reached its conclusions that the act was constitutional because the intrastate operations and interstate operations were so interwoven that it was utterly impractical to separate them, and that Congress clearly had the authority to regulate interstate commerce, thus in the third division of opinion, it was held that the Commerce Commission, under the terms of the act, had the right to require the filing of monthly reports. There is no express holding in this case that the commission had the right to require the reports on purely intrastate transactions.

(2.) Interstate commerce was not prohibited by the Act there under consideration, as is the case under Title 15, Section 1172, involved in the present case.

The case of INTERSTATE COMMERCE COMMISSION ET AL V. GOODRICH TRANSIT COMPANY, above cited, differs from the present case in that the Goodrich Transit Company was engaging in interstate commerce, which was not prohibited. The interstate commerce act in question in this case expressly stated that the act did not apply to transportation of persons or property wholely within one state.

On the last page of this opinion the distinction between this case and the present case is clearly set out by the following language:

"But bookkeeping may and ought to show how a business which, in part at least, is interstate commerce, is carried on, in order that the commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions . . ."

The other case dealing expressly with the requirement of reports is that of BOARD OF TRADE OF CHICAGO V. OLSEN, above cited. In this case it was held that in division nine of the opinion: "Grain Futures Act, September 21, 1922, Sec. 9 making it a misdemeanor for a member of Board of Trade designated thereunder to fail to evidence any contract for future delivery by a record in writing, is a legitimate means of enforcing the statutory regulation of Boards of Trade, which is within the power of Congress."

This case has no application to the present case because under the terms of the Grain Futures Act, the Act regulated interstate commerce and sales of grain in interstate commerce ONLY.

The case of KENTUCKY WHIP AND COLLAR COMPANY V. ILLINOIS RAILROAD COMPANY, 299 U.S. 334, is distinguishable from the present case because the prison made labor goods were actually tendered for shipment in interstate commerce.

The case of U.S. V. SULLIVAN 332 U.S. 689 is distinguishable from the present case because the act there under discussion requires the labeling or relabeling of the drugs, which had been received in interstate commerce, and therefore the burden would have been upon the government to prove that the goods at one time or another had moved in interstate commerce.

The case of WICKARD V. FILBURN, 317 U.S. 111 merely holds that Congress may regulate those activities intrastate which so affect interstate commerce, as to make regulation of them appropriate means to the exercise of the granted power to regulate interstate commerce. Certain it is that the grain here discussed would affect the total supply of grain in the country, and thus affect prices of grain shipped interstate.

The sum and substance of these cases which are relied upon by the Government is that in each and every one of them there was an element of interstate commerce, which Congress clearly has the power to regulate.

There was further intermingling of interstate and intrastate transactions, which were incapable of being separated and, at least in the Darby case, the intrastate transactions would affect interstate commerce, and thus would come under the power of Congress to regulate, as has been held in previous decisions of this Honorable Court.

However, in the case before this Court for decision Congress having prohibited interstate commerce,

there being no allegation in the indictment that appellees were engaged in any interstate transactions, it is manifest that Congress could not require the filing of these reports, since the transactions were neither interstate transactions, which would come under the power of Congress, nor were they intrastate transactions, which would in any wise affect interstate commerce.

Another line of cases the government relies upon is that of NIGRO V. U.S., 276 U.S. 352. This case and the case of U.S. V. DOREMUS, 249 U.S. 86 and that of LINDER V. U.S., 268 U.S. 5 deal with the Narcotic Act. As we have stated herein before the Harrison Narcotic Act in terms of its language, (see Title 26, Sec. 3221 A) is very similar to the language employed in the Johnson Act.

We can see that the Government could, in aid of a REVENUE MEASURE, require records and reports of purely intrastate transactions, but the Johnson Act is not a revenue measure. A glance at these cases will show clearly the distinction that we have pointed out.

The Court in NIGRO V. UNITED STATES, 276 U. S. 332 (see 48 S. Ct. 388) says:

"In interpreting Anti-Narcotic Act (26 USCA, 211, 691-711; Comp. St. 6287g-6287q) court must in view of amendment of sec. 1 by Revenue Act 1918, 1006 (26 USCA, 211, 691-695; Comp. St. 6287g), assume that it is taxing measure, since, if it were merely to regulate and restrain purchase of opiate and other drugs, it would be beyond the power of Congress, and invalid." (Emphasis ours).

In the case of U. S. V. DOREMUS, 249 U. S. 86 the Court said:

"If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it."

The act "has such relation to facilitating the collection of the revenue as to be within the power of Congress under the authority given by Const. Art. 1, Sec. 8, to impose excise taxes, and is not a mere attempt to exercise a power not delegated, the reserved police power of the states."

It was held in LINDER V. U.S. 268 U.S. 5 (see page 17 of the opinion):

"The declared object of the Narcotic Law is to provide revenue, and this Court has held that whatever additional moral end it may have in view must 'be reached only through a revenue measure and with the limits of a revenue measure.' UNITED STATES V. JIN FUEY MOY, 241 U.S. 394, 402, 36 S. Ct. 658, 60 L. Ed. Ann. Cas. 1917D, 854. Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. **And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be en-**

forced. (Emphasis ours) 45 S. Ct. R 446-448; McCulloch v. Maryland, 4 Wheat, 316, 423, 4 L. Ed. 497; U.S. v. DeWitt, 9 Wall. 41, 19 L. Ed. 593; Keller v. U.S. 213 U.S. 138, 29 S. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas 1066; Hammer v. Dagenhart 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A.L.R. 649 Ann. Cas. 1918E. 724; Child Labor Tax Case 259 U.S. 20, 42 S. Ct. 449, 66 L. Ed. 817."

Following the reasoning in the Linder Case we can not see how Title 15, USCA, Sec. 1173 can have any application to intrastate dealers in slot machines. The power to prohibit shipment of slot machines in interstate commerce is delegated to Congress by the Commerce Clause, and under it, Congress may prohibit interstate shipments of slot machines. How can it, in turn, regulate that which it prohibits? Or how can these intrastate sales affect interstate commerce, so as to allow Congress to require these reports when there can be no interstate commerce?

Thus, we concede the following to be the law and about which we have no difference of opinion with the government.

(1.) Congress has the power to ban from interstate commerce articles injurious to public health, morals or welfare and may aid state law enforcement by prohibiting the use of channels of interstate commerce to contravene state policy as is provided in Sec. 1172 of the Act.

(2.) In exercising its delegated power under the commerce clause, Congress can regulate those intrastate activities which so affect interstate commerce, or the

exertion of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end.

(3.) Congress can require records and reports of purely intrastate transactions in aid of a Revenue Measure.

4. THE INFORMATIONAL REQUIREMENTS, AS FAR AS PURELY INTRASTATE TRANSACTIONS ARE CONCERNED, ARE NOT REASONABLE MEANS OF ENFORCING THE PROVISION AGAINST INTERSTATE TRANSPORTATION OF SLOT MACHINES, AND THEREFORE ARE BEYOND THE POWER OF CONGRESS.

As a representative of the Attorney General said, whom we have quoted hereinbefore:

"This act did not intend to get us into a prohibition era."

We feel that the construction contended for by the Government might have this effect, for what dealer in a state in which slot machines are illegal, would report, under the terms of Section 1173 of the Act, that he had shipped machines to another state, where slot machines are illegal? To expect him to do so would seem to be the height of absurdity. For, what criminal who had just violated Section 1172 of the Act by so shipping slot machines would hesitate to violate Section 1173, by failing to make a report.

The analogy given by the Government on page sixteen of their brief overlooks the fact that the Act re-

quires only "dealers" and "manufacturers" to file reports.

The word "dealer" as it was used in the case of UNITED STATES V. 200 GAMBLING DEVICES, 103 Fed. Sup. 888: "implies a habitual course of dealing and considered from this viewpoint has been defined as meaning one who habitually and constantly, as a business, deals in and sells any given commodity." And also, "one who buys the product in quantities and parcels it out by sale in lesser amounts."

The act does not require purchasers, who do not buy with the intention of selling or casual sellers to report transactions. In the normal course of all business in this country, dealers do not sell to dealers, but dealers sell to a consumer or ultimate users. The act does not require that the ultimate user register. The reason that the analogy given on page 16 by the government is fallacious is this: If C referred to on page 16 of the brief purchased the machines from B, which had been shipped interstate and which sale had not been reported by B, and C was an operator who intended to put the machines on location, he would not be required under the terms of the Act to report the purchase. C also would know that the machine or machines were subject to seizure under Section 7 of the Act and even if he were a dealer, he would hardly report the purchase, so that it could be seized and he would lose the money he had paid.

The government is careful to label M as manufacturer and A as dealer, but it does not put the definition of dealer on C presumably, because the Govern-

ment recognizes that C would not be required to register under the terms of the Act.

We do not mean to imply that Sec. 1173 has no reasonable application to the enforcement of Sec. 1172, because of the possibilities of evasion, but we do here state that the construction contended for by the Government i.e. Sec. 1173 requires reports of purely intrastate transactions is an unreasonable construction to place upon the act because as we have shown heretofore in the brief, it was not the intention of Congress to regulate purely intrastate transactions or local matters, which would be in the hands of local authorities. Also this construction by the Government is not reasonable because the act requires only dealers and manufacturers to register and file reports, which in itself would reenforce our construction that the act intends only to require reports of interstate transactions. Since purchasers or casual seller would not be required to register their purchases and sales, Section 1173 would not enable the Government, even under its construction, to trace and identify every slot machine in the country.

Therefore, under the language used in U. S. v. LINDER, 268 U. S. (see page 17) which reads as follows:

". . . any provision of the Act of Congress ostensibly enacted under power granted by the Constitution, NOT NATURALLY AND REASONABLY ADAPTED TO THE EFFECTIVE EXERCISE OF SUCH POWER, but solely to the achievement of something plainly within power reserved to the states,

is invalid and cannot be enforced." The requirement is beyond the power of Congress.

5. SECTION THREE OF THE ACT IS VOID AND UNENFORCEABLE FOR VAGUENESS.

As we have outlined hereinbefore in this brief, Section 3 does not clearly designate where the reports are to be made, but uses the phrase "in such district." A district is, or should be, a definitely defined area. The Attorney General, on April 24, 1951, when he promulgated the regulation shown in Appendix B of the brief of the government, recognized this defect.

Congress has given the Attorney General no power to set up such a district. The Government itself on page 25 makes this statement:

"... and whatever doubt there might be under the language as to the place to which to send the report on the boundaries of the 'district' is dispelled by the regulation."

It can be seen from reading Counts 2, 3 and 4 of the indictment against Braun contained on pages 1 and 2 of the transcript of the records that Braun was in these counts charged with failure to report in February and March of 1951, which was before the regulation was adopted on April 24, 1951.

Even under the government's contention, there was some doubt prior to the adoption of the regulation. Therefore, the doctrine "where patently ambiguous language is so unclear and equivocal as to render its enforcement a denial of due process of law. Cf.

UNITED STATES V. CARDIFF, 344 U. S. 174; UNITED STATES V. SPECTOR, 343 U. S. 169, 171-172; UNITED STATES V. PETRILLO, 332 U. S. 1, 5-7," should be applied.

It was stated in the case of LANZETTA ET AL V. THE STATE OF NEW JERSEY, 306 U. S. 451-453: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in CONNALLY V. GENERAL CONST. CO. 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law'."

Therefore we feel fully justified that the terms of the Section 1173 are insufficient to inform those who are subject to it as to what their conduct should be.

III. CONCLUSION

1. The various charges in the indictment against the appellees being purely intrastate transactions and reports and registrations called for in Title 15, USCA, Sec. 1173 having no reasonable application to the prohibition of interstate commerce, it is beyond the power of Congress to require registration and reports of purely intrastate transactions.

2. Section 1173 of the Act is so vague and indefinite as to the place where the reports should be filed as to render the Section void for vagueness.

It is therefore respectfully submitted that the judgments of the District Court should be sustained.

MYRICK & MYRICK
Attorneys for Appellees

September 1953

BRANNEN, CLARK & HESTER
By Perry Brannen
Attorneys for Denmark

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

Indictment No. 13392

UNITED STATES OF AMERICA, APPELLANT

v.

MILTON M. BRAUN

STATEMENT AS TO JURISDICTION

In compliance with Rule 37(a)(1) of the Federal rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court dismissing the indictment.

OPINION BELOW

The opinion of the District Court has not yet been reported. A copy thereof is annexed hereto as an Appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered on February 26, 1953. The jurisdiction of the Supreme Court to review on

direct appeal the decision of the District Court dismissing the indictment based on a construction and the unconstitutionality of the statute upon which the indictment is founded is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(e) F.R. Crim. P.

QUESTION PRESENTED

Whether, in aid of its power to prohibit the shipping of gambling machines in interstate commerce, Congress may require dealers in such machines to register with the Attorney General, and to report all sales, including intrastate deliveries.

STATUTE INVOLVED

The Act of January 2, 1951, 64 Stat. 1134, upon which the instant indictment is founded is set forth in pertinent part as Appendix B to the Statement as to Jurisdiction in *United States* v. *Roscoe Denmark*, filed contemporaneously with the instant statement.

STATEMENT

On May 13, 1952, in the District Court for the Southern District of Georgia a five-count indictment was returned against the defendant, the first count of which charged him with engaging in the business of a dealer in gambling devices without having registered with the Attorney General of the United States his name, trade name, and address of his place of business, and in the remaining four counts with having failed to file with the Attorney General an inventory and record of various sales and deliveries of gambling devices, all as required

by Section 3 of the Act of January 2, 1951, 64 Stat. 1134 (15 U.S.C. 1173). Defendant filed a motion to dismiss the indictment which was granted on February 26, 1953.

In its opinion dismissing the indictment, the District Court noted that "No allegation is made in the Indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales." The Court held, as it had previously held in the companion case of *United States* v. *Denmark* that "Section 1173 has no application to the defendant in this case, since the statute under consideration does not apply to intra-state transactions which do not directly affect interstate commerce," and further that "the Statute involved, in so far as it undertakes to regulate purely intra-state transactions which do not directly affect interstate commerce, goes beyond the power of Congress under the Commerce Clause of the Constitution."

THE QUESTION IS SUBSTANTIAL

The instant case is a companion case to *United States* v. *Roscoe Denmark* from which decision of the United States District Court for the Southern District of Georgia the Government is appealing directly to the Supreme Court of the United States. As the District Court grounded its opinion both in this case and in the Denmark case on an identical interpretation of the applicability of Section 3 of the Act of January 2, 1951, the Government respectfully refers the court to the Statement

as to Jurisdiction filed contemporaneously with the instant Statement, which more particularly sets out the substantiality of the common question involved, and the error of the District Court in its opinion and order dismissing a similar indictment.

(Signed) ROBERT L. STERN,
Acting Solicitor General.

Dated: March 19, 1953.

Endorsement: Criminal Indictment No. 13392. Statement as to Jurisdiction of Supreme Court of United States on Appeal. Filed in Clerk's Office: March 26th, 1953. Eugene F. Edwards, Deputy Clerk.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION

Indictment No. 13392

Violation: Title 15, U.S.C., Section 1173

UNITED STATES OF AMERICA

v.

MILTON M. BRAUN

STATEMENT OF THE CASE

An indictment in five counts was returned against MILTON M. BRAUN in the District Court of the United States for the Southern District of Georgia, Savannah Division, charging a violation of Title 15, U.S.C. Section 1173.

The first count charges that the defendant was a dealer in gambling devices and failed to register with the Attorney-General of the United States.

The other four counts of the Indictment charged that the defendant on various dates sold amounts of gambling devices to named persons, and failed to file an inventory and record of sales and deliveries with the Attorney-General.

The defendant filed a motion to dismiss the indictment, on three grounds,—one of the grounds being that the Act, Section 1173, did not extend to purely intra-state transactions which do not directly affect interstate commerce, but if the Act was intended to apply to purely intra-state transactions, then the same was unconstitutional because

of the tenth amendment to the Constitution. As this opinion deals with the application of the said Act to purely intrastate transactions and the constitutionality thereof under the state of facts as alleged in the indictment, no discussion is had on the other grounds of the motion to dismiss.

The indictment and all counts thereof are based on Title 15, U.S.C., Section 1173. No allegation is made in the indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales.

OPINION AND JUDGMENT OF THE COURT

The Act in question, to-wit, Title 15, 1171-1175, was passed pursuant to the power of Congress to regulate interstate commerce. There is no question but that Congress has power to prohibit the transportation of gambling devices in interstate commerce. It is equally true that Congress has the power to regulate intra-state transactions which directly affect interstate commerce. But the power of Congress to regulate these matters cannot extend to matters the effect of which, whatever its extent, is indirect. (see *James Walter Carter* v. *Carter Coal Co., et al.*, 298 U.S. Page 238 (21), also see page 297.)

In the case of *United States* v. *Five Gambling Devices*, Libel for Forfeiture, in the Northern District of Georgia, Judge Sloan, in considering the Statute here involved, ruled: "It is neither shown nor contended that purely intra-state transactions in gambling devices in any way interfere with or

obstruct the regulation of such devices in interstate commerce, and to extend the Act to purely intra-state transactions gives to the Act an effect beyond the constitutional power of Congress. The Act does not apply to intra-state transactions."

In the case of *United States of America* v. *15 Mills Blue Bell Gambling Machines, et al.*, Libel in Rem, in the Middle District of Georgia, Judge Cooper, in considering the Statute here under consideration, ruled: "The fifth defense is predicated on the theory that the Act under which these proceedings are brought seeks to regulate intra-state commerce, which is beyond the power of Congress to do. This defense is sustained."

In view of the above decisions, and in view of the fact that there are no interstate transactions involved in this case, and the transactions involved in this case were purely intra-state transactions, the Court therefore is of the opinion that Section 1173 has no application to the defendant in this case, since the Statute under consideration does not apply to intra-state transactions which do not directly affect interstate commerce.

It seems clear to the Court that the Statute involved, in so far as it undertakes to regulate purely intra-state transactions which do not directly affect interstate commerce, goes beyond the power of Congress under the Commerce Clause of the Constitution.

In accordance with the foregoing opinion,

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court, That the motion of the defendant to dismiss the indictment and all the counts thereof, be, and

the same is hereby sustained, and said indictment and all counts thereof is hereby dismissed.

This 25th day of February, 1953.

(Signed) F. M. SCARLETT,
United States Judge.

Endorsement: Criminal Indictment No. 13392, Opinion and Judgment of Court on Defendant's Motion to Dismiss Indictment. Filed in Clerk's Office: February 26, 1953. Eugene F. Edwards, Deputy Clerk.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 201504 1010